



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT

ELC CASE NO. 1123 OF 2015

EUNICE WAIRIMU MUTURI.....1ST PLAINTIFF/APPLICANT

WASHINGTON MUCHIRI MUTURI.....2ND PLAINTIFF/APPLICANT

=VERSUS=

G M MUKUU.....1ST DEFENDANT/RESPONDENT

DIRECTOR OF SURVEY.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

HON.ATTORNEY GENERAL.....4TH DEFENDANT

RULING

BACKGROUND.

1. The applicants are the administratrix and administrator of the estate of the late Gerald Muturi Maina (deceased) who died on 10th January 2011. On the 23rd September 2003 deceased had entered into a sale agreement with Mavji Ranji Patel for the purchase of property described as LR No.209/1832 measuring 0.07461 of an acre. The consideration was Kshs.10,000,000/=. The deceased made a down payment of Kshs.3,000,000/=.
2. The transaction was not completed within 90 days as agreed. The deceased moved to court in 2005 and filed a suit seeking orders of specific performance. The vendor filed a defence to the deceased claim. On 6th September 2005, the deceased filed an application seeking to strike out the defence by the vendor. In a ruling delivered on 20th April 2010, the vendor's defence was struck out and an order given that the suit proceeds by way of formal proof.
3. The case proceeded by way of formal proof. On 22nd July 2015, the administrators of the estate of the deceased obtained judgement in their favour for specific performance. It became a challenge to enforce the judgement as the subject matter of the suit had been subdivided and one of the subdivisions amalgamated with another parcel to create LR No. 209/8334 which is now registered in the name of the first Respondent. The applicants are now registered as owners of LR No.209/1832/2.

APPLICANTS CONTENTION

4. The applicants contend that the subdivision of LR No.209/1832 was fraudulently done in collusion with the second and third respondent. They contend that the subdivision of LR No.209/1832 was taken away from the deceased's entitlement a portion measuring 3.3m². That the sub-division was done notwithstanding the fact that there was a caveat in place forbidding any dealings with LR No.209/1832. The applicants further contend that the first respondent was part of the scheme by the second and third respondent. It is on this basis that the applicants are seeking injunctive for preservatory orders to preserve LR No. 209/8334 until the hearing and determination of this suit.

FIRST RESPONDENT'S CONTENTION

5. The first respondent contends that he purchased LR No. 209/8334 (suitland) from Mwangi Thuo Holdings Limited on 19th October 2007. A transfer was duly signed and he has since obtained title to the suitland. He took possession of the suitland . He took possession of the suitland and has since put in tenants who are paying him rent. That he has further charged the suitland to Barclays bank of Kenya and that any injunction issued will affect the Bank which is not a party to this suit.

6. The first respondent further contends that as at the time the deceased filed a suit against the vendor, the process of subdivision and amalgamation had been concluded and title in respect of LR No. 209/1832 had been closed. The caveat put in place by the deceased was put against a non-existent title and that there is no prove of any fraud in the sub-division and amalgamation.

ANALYSIS

7. This is an application for injunction and the principles for grant of the same have long been settled in the case of **Giella Vs Cassman Brown Co.Ltd (1973) EA 358**. An applicant has to demonstrate that he has a prima facie case with probability of success. An injunction will not normally be issued unless otherwise the applicant will suffer injury which cannot be compensated in damages. If the court is in doubt, it will decide the application on a balance of convenience.

8. I have gone through the documents presented before me by both the applicants and the first respondent. What is clear is that the process of subdivision of LR No.209/1832 started long before the deceased entered into the agreement with the vendor. There is a letter dated 19th November 2003 from the Ministry of Lands and settlement addressed to the supporting affidavit of the first respondent confirm that the vendor had begun the process of subdivision of LR No. 209/1832. He tried to stop the process through his letter of 23rd September 2003 but he was informed that the sub division process had gone far. The date the vendor wrote seeking to cancel the subdivision is the same date he entered into the agreement with the deceased.

9. It would appear that the deceased was put in the picture of these developments that is why he moved to registrar a caveat on LR No.209/1832 and soon thereafter filed a suit for specific performance. I have looked at the defence filed by the vendor in which he had stated that the agreement between him and the deceased was varied in January 2004 and that the deceased was to be given his title after the subdivision. The vendor was not given an opportunity to give evidence of the variation of the agreement as his defence was struck out. However, be that as it may, the question which needs to be answered is whether the applicants have demonstrated that they have a prima facie case against the respondents.

10. It is clear from the documents availed that the process of subdivision was requested by the vendor Mavji Ramji Patel. The request for sub-division was made before the deceased entered into a sale agreement with the vendor. Though the vendor attempted to stop the process it was not possible. The process of subdivision was carried through and LR No.209/1832 was subdivided into two portions. LR No.209/1831 was amalgamated to LR No. 209/2678 and became LR No. 209/8334. This amalgamated title was then registered in the name of Mwangi Thuo Holdings Limited which sold it to the first respondent. There is no evidence to show that there was any wrong doing either on the part of the first respondent or the second and third respondents. The first respondent was a purchaser of the suitland. The vendor had requested for his plot to be sub-divided and it cannot therefore be said that the Director of survey and chief land Registrar colluded to sub -divide the land. To this extent, I do not see what prima

facie case the applicants have against the respondents.

CONCLUSION

11. From the analysis herein above, it is clear that the applicant's application lacks merit. The same is hereby dismissed with costs to the first respondent.

Dated, Signed and delivered at Nairobi on this 2nd day of October, 2017.

E.O.OBAGA

JUDGE

In the presence of:

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Court Assistant: Hilda

E.O.OBAGA

JUDGE